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**IN THE  
COURT OF APPEALS OF INDIANA**

ALEC CLARK,  
Appellant-Defendant,  
vs.  
STATE OF INDIANA,  
Appellee-Plaintiff.

APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Amy Barbar, Magistrate  
Cause No. 49G02-0709-FC-201164

**OCTOBER 14, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**HOFFMAN, Senior Judge**

Alec Clark appeals his convictions for burglary as a class C felony and theft as a class D felony as well as his sentence thereon. We affirm.

Clark raises the following two issues:

1. Whether there is sufficient evidence to support his convictions; and
2. Whether the trial court erred in sentencing him.

The facts most favorable to the verdict reveal that in 2007, C.P. Morgan Company (Morgan) was constructing homes in a development at 42<sup>nd</sup> Street and German Church Road. Copper lines running from furnaces to condensers were being stolen from almost every house in the development just before drywall was hung in the house. Each line cost \$400.00 to \$600.00.

Field Construction Manager Kevin Bettag contacted the police, who suggested Beatty spray each new copper line with distinctive red paint. In addition, in September 2007, Field Construction Manager David Bowden set up two motion-activated cameras at one of the houses just before the drywall was to be hung. The house's windows and exterior doors were installed and locked.

The following Monday morning, Bettag discovered the copper tubing installed in the house was gone. One photograph taken by the motion-activated camera showed a man cutting through the foam insulation board on the side of the house. The other photograph showed a person with tattoos and a wallet chain attached to his pants walking through the house holding copper lines. Bettag sent the two photographs to the police. Officer Jason Pendergast circulated the photos among local scrap dealers. Later that week, a scrap metal business employee contacted Officer Pendergast regarding Clark.

When Officer Pendergast met with Clark, the officer noticed that Clark's tattoos and wallet chain matched those of the man in the photographs. In addition, both Clark and the man in the photographs were bald. Officer Pendergast arrested Clark and found marijuana during a search of Clark's pockets. The officer also found a large amount of copper tubing in Clark's car. Bettag identified the copper tubing as that taken from the Morgan development. Specifically, Bettag explained that the copper tubing was the size Morgan used, bore thermostats Morgan used, had the distinctive red paint on it, and the ends of the tubes had distinctive black duct tape used by Morgan. Officer Pendergast also learned that Clark had previously worked in the housing development for a painting contractor.

A jury convicted Clark of burglary as a class C felony, theft as a class D felony, and possession of marijuana as a class A misdemeanor. Clark admitted that he had a prior conviction for possession of marijuana, which enhanced his possession of marijuana conviction to a class D felony. Clark also admitted that he was an habitual offender.

Evidence at the sentencing hearing revealed that Clark has an extensive criminal history that includes sixteen convictions, nine of which are felonies. In addition, Clark's probation was revoked four times. The trial court found Clark's criminal history to be an aggravating factor and found no mitigating factors. The court sentenced Clark to a total sentence of thirteen years.

Clark first argues that there is insufficient evidence to support his convictions. Our standard of review for sufficiency of the evidence is well settled. We will neither reweigh the evidence nor judge the credibility of witnesses. *Tobar v. State*, 740 N.E.2d

109, 111 (Ind. 2000). Rather, we will affirm the trial court if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt. *Id.* at 111-12.

Indiana Code Section 35-43-2-1 provides in relevant part that a person who breaks and enters the building structure of another person with the intent to commit a felony in it commits a Class C felony. Indiana Code Section 35-43-4-2 provides in relevant part that a person who knowingly or intentionally exerts unauthorized control over the property of another person with the intent to deprive the other person of any part of its value or use commits a Class D felony. Clark argues that there is insufficient evidence to support his convictions of burglary and theft because the State failed to prove that 1) he was the person in the photographs, 2) he knew the copper was stolen; and 3) the copper belonged to Morgan.

However, burglary and theft convictions may both be sustained by circumstantial evidence. *Miller v. State*, 563 N.E.2d 578, 581 (Ind. 1990). Here, our review of the evidence reveals that Clark's tattoos and wallet chain matched those of the man in the photographs taken at the house. In addition, both Clark and the man in the photographs were bald. Further, Officer Pendergast found a large amount of copper tubing in Clark's car. A Morgan field construction manager identified the tubing as that taken from the Morgan development. Specifically, the manager noted that the copper tubing was the size Morgan used, bore thermostats Morgan used, had the distinctive red paint on it, and the ends of the tubes had distinctive black duct tape used by Morgan. Lastly, Clark had

previously worked in the housing development for a painting contractor. This evidence is sufficient to support Clark's convictions for both burglary and theft.

Clark further argues that the trial court erred in sentencing him. At the outset, we note that because the offenses in this case were committed after the April 25, 2005, revisions to the sentencing statutes, we review Clark's sentence under the advisory sentencing scheme. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). When evaluating sentencing challenges under the advisory sentencing scheme, we first confirm that the trial court issued the required sentencing statement, which includes a reasonably detailed recitation of the trial court's reasons for imposing a particular sentence. *Id.* at 490. If the recitation includes a finding of aggravating or mitigating circumstances, the statement must identify all significant mitigating and aggravating circumstances and explain why each circumstance has been determined to be mitigating or aggravating. *Id.*

So long as the sentence is in within the statutory range, it is subject to review only for abuse of discretion. *Id.* An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* One way in which a trial court may abuse its discretion is failing to enter a sentencing statement at all. *Id.* Another example includes entering a sentencing statement that explains reasons for imposing a sentence, including aggravating and mitigating factors, which are not supported by the record. *Id.* at 490-91.

Because the trial court no longer has any obligation to weigh aggravating and mitigating factors against each other when imposing a sentence, a trial court cannot now

be said to have abused its discretion in failing to properly weigh such factors. *Id.* at 491. This is so because once the trial court has entered a sentencing statement, which may or may not include the existence of aggravating and mitigating factors, it may then impose any sentence that is authorized by statute and permitted under the Indiana Constitution. *Id.*

Here, Clark contends that the trial court erred in failing to consider the hardship to his children and diabetic girlfriend as a significant mitigating factor. Many people convicted of serious crimes have one or more children, and absent special circumstances, trial courts are not required to find that imprisonment will result in an undue hardship. *Ware v. State*, 816 N.E.2d 1167, 1178 (Ind. Ct. App. 2004). Indeed, these mitigators can properly be assigned no weight when the defendant fails to show why incarceration for a particular term will cause more hardship than incarceration for a shorter term. *Weaver v. State*, 845 N.E.2d 1066, 1074 (Ind. Ct. App. 2006), *trans. denied*. Here, Clark points to no evidence that his sentence would impose any more hardship on his children than a shorter sentence. Further, Clark's girlfriend managed her diabetes for twenty-two years before she met Clark, and we agree with the State that there is no evidence that she will not be able to manage her illness without Clark's assistance. The trial court did not err in sentencing Clark.

Affirmed.

DARDEN, J., and KIRSCH, J., concur.

